IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

CONTEMPT PETITION NO.118 OF 2003

IN

ARBITRATION PETITION NO.177 OF 2002

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TATA Finance Ltd. ...Petitioner

v/s.

Elbee Services Ltd. & Anr. ...Respondents

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Mr.B.B.Saraf i/b Kartikaya & Associates for the Petitioner.

Mr.A.Y.Bookwala i/b M.U.Pandey for the Respondents.

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CORAM: D.K.DESHMUKH, J.

DATED: 27TH FEBRUARY,2007

P.C.:

1. By this petition, it is alleged that the Respondent No.2 has willfully disobeyed the order passed by this court in Arbitration Petition No.177 of 2002 as also has deliberately violated his own undertaking given to the court.

2. The facts, that are material and relevant, are that Arbitration Petition No.177 of 2002 was filed by the Petitioner wherein the present Respondent No.1 Elbee Services Limited was joined as Respondent No.1 and the present Respondent No.2 Mr.Sandip Shah was joined as Respondent No.2. It appears that there was some debt to be recovered by the Petitioner from the Respondent No.1, which was the principal debtor and the present Respondent No.2, apart from being the Managing Director of the Respondent No.1 was also the guarantor. After hearing both sides, the court made final order dated 10th October, 2002. The operative part of the order is contained in paragraphs 20 and 21 of that order, which read as under:-

20. In the circumstances, I am of the view that it would be appropriate to grant the relief as prayed for in terms of prayer clause (d) of the Arbitration Petition. However, the relief as prayed is confined only to a disclosure by the First Respondent on oath of the amounts which have been received from Respondent Nos. 4 to 7 with effect from December 1999 until date. The disclosure shall be made within a period of 3 weeks. There shall be a further direction to the First Respondent that all receivables which are received in future by the First Respondent from the Fourth to Seventh Respondents shall be deposited in the escrow account pending the arbitral proceedings to the extent of Rs.2 crores. However, it is expressly clarified that the Petitioner shall not be entitled to deal with any part of the moneys which are deposited in the escrow account and these shall continue to lie in the escrow account. Parties will be at liberty to move the Learned Arbitrator for suitable orders in regard to investment of the moneys.

> 21. The moneys upon deposit in the escrow account will be invested in a Fixed Deposit of the HDFC Bank in which the escrow account is maintained so that the moneys can earn interest. The moneys will be invested in the HDFC Bank for three months and one day on each occasion to be renewed thereafter pending the arbitral proceedings.

3. Thus, by the above referred order the first Respondent was directed to disclose on oath the amounts which have been received by the Respondent No.1 from the parties who were Respondents Nos. 4 to 7 with effect from December, 1999 till the date of the order i.e. 10th October, 2002 and that disclosure was to be made within a period of three weeks from the date of the order. It was further directed that the amount that will be received in future by the first Respondent from the aforesaid Respondents will be deposited in escrow account. It appears that after the order was made on 10th October, 2002, the advocate appearing for the Respondent No.1 sought adjournment to seek instructions on the point whether the Respondent No.1 is willing to deposit certain amount every month in

the escrow account so as to secure the claim of the Petitioner and therefore the court directed the matter to be placed before the court.

. When the matter was placed before the court, on behalf of the first Respondent an undertaking was given to the Court that the first Respondent shall deposit the amount of Rs.6 lakh per month from 1st November,2002 in the escrow account and that every month Rs.6 lakh will be deposited up to the period ending 31st December, 2002. The first Respondent further undertook to deposit Rs.10 lakh per month from 1-1-2003 in the escrow account and he undertook to continue to deposit the amount till he deposits the amount of Rs.2 crore in that account.

4. After recording this undertaking the court decided to accept that undertaking in order to grant fair opportunity to the first Respondent. The Court accepted that the undertaking subject to the condition that if there are any two defaults on the part of the first Respondent in depositing the amount, the original order shall become operative and on the amounts being deposited in the escrow account,

the amount will be invested in fixed deposit of the HDFC Bank. An appeal was preferred against the order before the Appeal Court. That Appeal was registered as Appeal No.114 of 2003. That Appeal was disposed of by order dated 25-2-2003. It appears from the order of the Appeal court that even before the Appeal Court the Appeal was argued and ultimately before the Appeal Court again an undertaking was given on behalf of the first Respondent on revised terms. Now the second Respondent on behalf of the first Respondent undertook to deposit Rs.6 lakh per month from 1st April, 2003 and that amount was to be deposited till 31st May, 2003. He further undertook to deposit the amount of Rs.10 lakh from 1-6-2003 till he deposits the amount of Rs.1.75 crore in the escrow account. Second undertaking is dated 25-2-2003. The Appeal Court in the order provided that in view of the undertaking the order which is impugned in the appeal will stand modified only to the extent of the undertaking. The Appeal Court accepted the undertaking. The appeal court observed that the rest of the order of the learned single Judge will remain in force. As per the undertaking dated 25-2-2003 Rs.6 lakh were to be deposited per month from 1st April, 2003. Admittedly nothing was deposited. The

Respondent No.2 never abided by the undertaking given by him either before the learned Single Judge nor the undertaking given before the Appeal Court. The first Respondent also did not pay the amounts which were claimed by the Petitioner. The Petitioner, therefore, has filed this contempt petition.

5. According to the Petitioner the Respondent No.2 has induced this court to make orders by giving undertaking and has not abided by his undertaking and therefore he is guilty of having committed civil contempt of this court.

6. On behalf of the Respondents, it is submitted that the Respondent No.2 had given his undertaking, but the court had provided for the consequence of the Respondent No.2 failing to abide by his undertaking and therefore, according to the Respondents the second Respondent cannot be held guilty of not abiding by his undertaking because in the order made by the court consequence of his failure is provided. It was pointed out to the Respondents that even accepting this submission, that on the failure of the first Respondent to abide by the undertaking, the

order dated 10th October, 2002 comes into force then as per that order he was required to file the affidavit disclosing the amount received by him from December, 1999 till the date of the order and that the first Respondent has not complied with even that order. It is submitted on behalf of the Respondent that the affidavit of disclosure in terms of the order dated 10th October, 2002 remained to be filed because of the error/omission/ lapse on the part of the Respondent No.1 and for that the Respondent No.1 has tendered unconditional apology. It was therefore submitted that the Respondent No.2 cannot be held guilty of having committed civil contempt of this court.

7. The learned Counsel appearing for the Petitioner pointed out that in the affidavit filed by the second Respondent dated 29-1-2004 in this contempt petition, the second Respondent has disclosed the amount received from Respondents Nos.4 to 7 to the Arbitration Petition from December, 1999 till 18th October, 2002 and he has stated that no amounts have been received by the first Respondent from the Respondents Nos.4 to 7 in the arbitration petition subsequent to 18th October,2002. It was pointed out

that this statement is incorrect and false, because the same Respondent No.2 has filed the affidavit in Contempt Petition No.16 of 2004, where he himself has disclosed that amounts have been received by first Respondent from Respondents Nos. 4 to 7 in the Arbitration Petition subsequent to 18th October, 2002. When this was pointed out to the Respondents, the response of the Respondents was that the amounts that have been received after 18th October, 2002 are small amounts and therefore the statement made in the affidavit filed in reply that no amounts were received after 18th October, 2002 cannot be said to be a false statement. It was also argued that the proceedings for civil contempt are of quasi-criminal nature and therefore unless the charge is proved to be true on the basis of the averments made in the petition, the Respondents cannot be held guilty.

8. Now, if in the light of these rival submissions the record of the case is perused, it becomes clear that on 10th October, 2002 after hearing both sides the court made the order, operative part of which is quoted above, issuing directions to the first Respondent to file the affidavit of disclosure and directing that amounts that are received in future

shall be deposited in the escrow account. It is clear from that order that the court was requested to adjourn the matter because the advocate appearing for the Respondent No.1 wanted to take instructions whether the first Respondent is willing to deposit certain amounts in the escrow every month so that the claim of the Petitioner in Arbitration is secured. This shows that the first Respondent also accepted that the claim of the Petitioner in Arbitration requires to be secured and therefore voluntarily an undertaking was given to the court to deposit the amount in escrow account. The order provided that in case the second Respondent who had given this undertaking on behalf of the first Respondent abides by this undertaking then the order dated 10th October, 2002 will not come into operation. Therefore, really speaking in the face of the undertaking there was no order of the court which could have been subjected to any challenge. But appeal was filed challenging that order. The conduct of the Respondents of filing the appeal clearly shows that he had no intention to abide by the undertaking given before the learned Single Judge. The entire show of giving undertaking was made just to postpone inevitable and buy a time. What is pertinent that it

is nobody's case that there was any interim order passed by the Appeal Court. But still no attempt was made to abide by the undertaking given by the Respondent No.2 on behalf of the Respondent No.1 while the appeal was pending. The Appeal was disposed of on 25-2-2003. Before the Appeal court revised undertaking was given. Again to abide by that undertaking a cheque was given, which was dishonoured. What is pertinent is the undertaking was given on 25-2-2003, the deposit was to be made from 1st April, 2003. If there was any compelling reason because of which the Respondent No.2 was not in possession to abide by that undertaking, the Respondent No.2 could have moved the court for being relieved of the undertaking any time before 1st April, 2003, because entire month March was at the disposal of the 2nd Respondent to do that, but nothing was done. A submission was made that on failure of the Respondent No.2 to abide by the undertaking, the order dated 10th October, 2002 comes into force. If that is the understanding of the Respondent No.2, then it was for him to comply with the order passed by the court because by that date his appeal against that order was already disposed of and he did not carry the matter any further. But no

affidavit of disclosure was filed. From the conduct of the Respondent No.2 it is clear that he had no intention to abide by his undertaking. In what circumstances the undertaking was given is tried to be explained by filing an affidavit dated 26-2-2007 by the Respondent No.2. In that affidavit it is stated that there were some business deals under negotiations and because of that the second Respondent was expected to receive funds and therefore he gave an undertaking, but he could not abide by his undertaking because the deals did not come through. No documents have been produced in support of this claim. It is also not explained as to why if on the basis some misconception an undertaking was given and when it was realised that the Respondent No.2 is not in a position to abide by his undertaking he did not apply to the court explaining the circumstances and did not seek any order of the court for being relieved from the undertaking. Therefore, it cannot be believed that for some valid reasons the undertaking was given and because of some compelling circumstances the Respondent No.2 could not abide by the undertaking. The material disclosed on record shows that the Respondent No.2 had no intention to abide by the

undertaking. The ploy of giving undertaking first before the learned single Judge and then before the Appeal Court was adopted in order to buy time. It is the case of the Respondent No.2 himself that the consequence of his failure to abide by the undertaking is that the order dated 10th October, 2002 comes into force. That order obliges him to file an affidavit within three weeks disclosing the amounts received by him. The only explanation for that failure is " I say that as far as the non-disclosure on oath by the Respondent No.1, the amounts received from the four customers from December 1999 till 10th/18th October, 2002 is an error/omission/laps on the part of the Respondent No.1 and I tender an unconditional apology for the same", and in that affidavit the disclosures have been made. That affidavit is dated 29-1-2004. This contempt petition, from the record it appears that, was served on the Respondents in the month of December, 2003, when the Respondent No.2 actually appeared before the court on 18-12-2003. Even after receiving copy of the contempt petition, immediately affidavit of disclosure was not filed and he waited till he filed his affidavit in reply to make the disclosure. Even the disclosure made admittedly is

not correct. The submission that because the amounts received were small amounts, a statement was made that no amounts were received is incapable of being accepted. This shows that the second Respondent is extremely casual in so far as the compliance with the order passed by the court are concerned. The conduct of the Respondent No.2, as narrated above, thus leaves in one no doubt that the Respondent No.2 has given undertakings to the court which he had no intention to abide by. He has disobeyed the orders of the courts willfully and deliberately. He had never any intention to obey any of the orders passed by the court, and therefore, in my opinion, the second Respondent is guilty of having committed civil contempt of the court. The learned Counsel appearing for the second Respondent submitted that the second Respondent has tendered his apology, which should be accepted. In my opinion, looking to the conduct of the Respondent No.2 throughout, it cannot be said that the apology tendered by him is genuine or heart felt. One significant reason for holding that even while making disclosure he has been casual, because even making disclosure he has made incorrect statement that no amounts were received by him from four Respondents after 18th October, 2002 when in

fact admittedly amounts were received.

. So far as question of imposing sentence on the second Respondent is concerned, the learned Counsel appearing for the Petitioner submitted that there is another contempt petition filed against the second Respondent i.e. Contempt Petition No.16 of 2004, which is also on board and therefore the question of sentence should be considered after hearing that Contempt Petition, because conduct of Respondent No.2 in that matter may be relevant to consider the quantum of punishment to be imposed on the Respondent No.2.

. The request is not opposed on behalf of the second Respondent.

. Therefore, it is directed that the question of appropriate sentence to be imposed on the second Respondent would be considered while deciding the contempt petition No.16 of 2004.

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